84-244

Office-Supreme Court, U.S.
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AUG 13 1984
ALEXANDER L. STEVAS,
CLERK

CASE NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

STATE OF FLORIDA,

Petitioner,

vs.

JEFFREY NEASE a/k/a MICHAEL COLWELL
a/k/a LOUIS POYNTER,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA, FOURTH DISTRICT.

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34 pp

QUESTION PRESENTED

WHETHER THE FOURTH DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA INCORRECTLY CONSTRUED THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION, AND FLORIDA V. ROYER, ___ U.S. ___, ___, S. Ct. ___, 75 L.Ed. 2d 229 (1983) BY HOLDING THAT THE CIRCUMSTANCES IN THIS CASE WERE NOT SUFFICIENT TO JUSTIFY THE INITIAL STOP?

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STATUTES:	
28 U.S.C. §1257(3)	2

OPINIONS BELOW

The opinion of the District Court of Appeal of the State of Florida, Fourth District, was filed on December 7, 1983; that court denied rehearing on January 8, 1984. Nease v. State, 442 So. 2d 325 (Fla. 4th DCA 1983).

GROUND UPON WHICH JURISDICTION IS INVOKED

The opinion of the District Court of Appeal of the State of Florida, Fourth District was filed on December 7, 1983, reversing Respondent's conviction and remanding the case with directions to discharge the defendant (A. 1). That court denied a timely motion for rehearing on January 18, 1984 (A. 2). In an unreported order, the Supreme Court of Florida denied the State's petition for discretionary re-

view on June 29, 1984 (A. 3). Thus, the opinion of the Fourth District Court of Appeal is the decision of the highest court in which the decision could be had in this case. See Williams v. Florida, 399 U.S. 78, 80 n.5 (1970).

This petition is timely filed within 60 days of the denial of review by the Florida Supreme Court, and this Court's jurisdiction is invoked under 28 U.S.C. §1257(3). [a motion tolling and extending the state speedy trial period pending the disposition of the instant petition is pending before the trial court].

FEDERAL CONSTITUTIONAL PROVISION INVOKED

The Fourth Amendment to the United States Constitution provides as follows:

> The right of the people to be secure in their persons, houses,

> papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath and affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

Defendant[1/] was charged with trafficking in cocaine in an amount in excess of four hundred (400) grams and possession of methaqualone. On appeal to the Fourth District Court of Appeal, defendant assigned as error the denial of his Motion to Suppress the cocaine and methaqualone. On December 7, 1983, the Fourth District Court of Appeal issued its opinion reversing the judgment

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1/ Throughout this petition, Petitioner will be called "the state," and Respondent will be called "defendant."

and sentence of the trial court (A. 1). Motion for Rehearing was denied on January 18, 1984 (A. 2). It is the decision of the District Court which Petitioner seeks to have reviewed by this Honorable Court.

The facts pertinent to this appeal as set forth in the opinion of the Fourth District Court of Appeal are as follows:

Agents observed Defendant at the Delta Airlines ticket counter at the Fort Lauderdale Airport. He was carrying with him a garment bag and a small shoulder bag. He paid cash for a one-way ticket from Fort Lauderdale to Cincinati. He appeared nervous and moved from foot to foot while he was in the ticket line. Agents approach-

ed Defendant and after identifying themselves as police officers, they received permission to look at his ticket and driver's license. Noting different names on the ticket and license, the agents again identified themselves, this time as narcotics agents, and asked permission to hand search Defendant's luggage. Initially he consented and accompanied the agents to a small storage area. As they neared the area, Defendant refused to enter. He then turned and ran but was tackled and arrested by two of the agents. While the agents were chasing Defendant, another agent went through Defendant's bags and found cocaine. After he was arrested a search of his person revealed six

methaqualone tablets.

The Fourth District Court of Appeal held that the facts as outlined above were simply not sufficient to justify the initial stop. However, the court did hold that the initial contact with the Defendant could be characterized as citizen encounter. In the view of the Fourth District Court of Appeal, Defendant's flight in conjunction with the aforementioned factors (drug courier profile) were not sufficient to create probable cause to justify Defendant's arrest. Additionally, the court specifically found that the Defendant's leaving the scene in the manner described above, did not constitute an abandonment of his luggage.

The State seeks to invoke the dis-

cretionary jurisdiction of this Court to review the decision of the State court erroneously interpreting the strictures of the Fourth Amendment as interpreted by this Court in Florida v. Royer, supra. The decision in controversy concerns an eminently important and unsettled area of law.

REASONS FOR GRANTING THE WRIT

The Fourth District Court of Appeal concluded that under Florida v. Royer, ___ U.S. ___, 103 S. Ct. 1319, 75 L.Ed. 2d 229 (1983), the Defendant's drug courier profile characteristics were an insufficient basis to warrant Defendant's initial stop. The State submits that the lower court has misread Florida v. Royer, supra, and that this misinterpretation improperly curtails police investigations and

and controvenes the public interest involved in the suppression of illegal transactions in drugs or of any other serious crime.

True under Florida v. Royer, supra, drug courier profile by itself does not confer probable cause for search and seizure, but it can under some circumstances create a reasonable, articulable suspicion to justify temporary detention.

> We agree with the State that when the officers discovered that Royer was traveling under an assumed name, this fact, and the facts already known to the officers--paying cash for a one-way ticket, the mode of checking the two bags, and Royer's appearance and conduct in general--were adequate grounds for suspecting Royer of carrying drugs and for temporarily detaining him and his luggage while they attempted to verify or dispell their suspicions

> in a manner that did not excede the limits of an investigative detention.

Florida v. Royer, supra at 75 L.Ed. 2d at 239.

The lower court sub judice was correct in finding that the initial contact between Defendant and the police could be characterized as a voluntary citizen/police encounter. However, the court was mistaken in its assessment that the behavior which the police observed did not create the founded suspicion for a limited investigative detention. The Florida v. Royer decision as cited above makes clear that in certain instances exhibition of drug courier profile characteristics does provide adequate grounds for suspecting an individual

of carrying drugs and for temporarily detaining such person and his luggage while attempting to verify or dispel their suspicions in the least non-intrusive manner.

Since this Court found that the display of drug courier profile characteristics were sufficient in Royer to justify his temporary detention, the same finding should apply to the circumstances of this case. The initial question before this Court is whether the facts as established in the lower court opinion warrant the conclusion that the initial stop was unjustified. The State submits that the answer to the question is that the facts do not warrant the conclusion that the stop was improper.

The State will now proceed to the second level of this argument, and show that the events which occurred subsequent to the initial stop support the contention that the actions of the police did comport with the ultimate test of reasonableness under the Fourth Amendment and that the police did in fact acquire probable cause for the ensuing search and seizure.

The police identified themselves as narcotics agents working at the airport and asked for Defendant's cooperation in a hand search of his luggage. Defendant agreed. They proceeded to a small storage room but immediately prior to entry the Defendant took flight leaving his baggage behind. The State maintains that the

flight in conjuction with the aforementioned factors of being informed that the police were narcotics agents, the purchase of a one-way ticket paid for in cash, Defendant's extreme nervousness, and the discrepancy between the name on his airline ticket and his personal identification were sufficient to create a probable cause for trained narcotics officers to believe that the Defendant was engaging in criminal conduct.

The State contends that the Fourth District Court of Appeal in the instant case did not give sufficient consideration to the element of flight in conjunction with all of the aforementioned factors which cast suspicion on the Defendant. The court found:

> Realistically, we all know that running from the police indicates guilt or fear warranting further investigation. However, the constitutional requirement of probable cause cannot be satisfied by the bootstrapping effect of tackling the apparent innocent person who chooses to sprint instead of politely declining to be searched.

The appellate court's initial erroneous conclusion has a snowballing effect in this case. Had the court realized that while the drug courier characteristics did not confer probable cause, they did at least provide a basis for a limited investigatory stop, in all likelihood the court would have drawn the corollary that the added factor of flight under the circumstances did provide probable cause for the search and seizure. It is because the court labor-

ed under the misapprehension that the Defendant's conduct did not create a reasonable articulable suspicion in the minds of trained narcotics enforcement officers to believe the Defendant was engaged as a drug courier that the court could not appreciate the significance of the Defendant's flight.

The Court overlooked the fact that just as a jury may infer consciousness of guilt from evidence of flight, so may a police officer infer consciousness of guilt when a suspect takes flight. As this Court recognized in Sibron v. New York, 392 U.S. 40, 20 L.Ed. 2d 917, 88 S. Ct. 1889 (1968):[2/]

2/ See also United States v. Harley, 682 F. 2d 398 (2nd Cir. 1982) for a good discussion of the significance of flight in a case where there is a pre-existing suspicion.

> [F]light is a 'strong indicia of mens rea.' Thus, if there already exists a significant degree of suspicion concerning a particular person, the flight of that individual upon the approach of the police may be taken into account and may well elevate the pre-existing suspicion up to the requisite Fourth Amendment level of probable cause.

CONCLUSION

It must be remembered that the Fourth Amendment is meant to protect against unreasonable search and seizure. The State has maintained all along that the actions of the police did comport with the ultimate test of reasonableness under the Fourth Amendment and that the Fourth District analysis of the situation and finding that the police acted in contravention of the Fourth Amendment is in error. The State respectfully submits that this

case involves a substantial federal question which should be resolved by this Court, and respectfully requests that this Court grant its petition for writ of certiorari to the District Court of Appeal of the State of Florida, Fourth District.

Respectfully submitted,

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A P P E N D I X

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IN THE DISTRICT COURT OF APPEAL OF THE
STATE OF FLORIDA
FOURTH DISTRICT JULY TERM 1983

JEFFREY NEASE a/k/a
MICHAEL COLWELL a/k/a
LOUIS POYNTER,

Appellant

v. CASE NO. 82-2164

STATE OF FLORIDA,

Appellee.

_____/

Opinion filed December 7, 1983

Appeal from the Circuit Court for Broward County; Patricia Cocalis, Judge.

Steven J. Finta, Fort Lauderdale, for appellant.

Jim Smith, Attorney General, Tallahassee, and Marlyn J. Altman, Assistant Attorney General, West Palm Beach, for appellee.

BERANEK, J.

Appellant was charged with and found guilty of trafficking in cocaine

and possession of methaqualone. He raises four points on appeal, one of which is dispositive. We hold that the trial court erred in denying appellant's motion to suppress the drugs.

This is an airport drug courier profile seizure. Agents observed appellant at the Delta Airlines ticket counter at Fort Lauderdale airport. He was carrying with him a garment bag and a small shoulder bag. Appellant paid cash for a one-way ticket from Fort Lauderdale to Cincinnati. Agents testified that he appeared nervous and moved from foot to foot while he was in the ticket line. They approached appellant and after identifying themselves as police officers, they re-

ceived permission to look at his ticket and his driver's license. Noting different names on the ticket and license, the agents again identified themselves, this time as narcotics agents, and asked permission to hand search appellant's luggage. Appellant initially consented and accompanied the agents to a small storage area. As they neared the area, appellant refused to enter. He then turned and ran but was tackled and arrested by two of the agents. While the agents were chasing appellant, another agent went through appellant's bags and found cocaine. After appellant was arrested, a search of his person revealed six methaqualone tablets.

The facts as outlined above were

simply not sufficient to justify the initial stop. See Florida v. Royer, ___ U.S. ____, ___ S. Ct. ___, 75 L.Ed. 2d 229 (1983), and Horvitz v. State, 433 So. 2d 545 (Fla. 4th DCA 1983). It should be noted that the state in its brief characterizes the initial contact between appellant and the police as a voluntary citizen/police encounter. We agree with this characterization. Being a voluntary encounter, appellant had the right to withdraw any consent which he might have given previously. Lacking probable cause and appellant's consent, the agents illegally searched the bags. Furthermore, the mere withdrawal of consent did not give the agents probable cause to arrest appellant after tackling him. We do not view

appellant's leaving the scene as an abandonment of his luggage. Obviously, a voluntary citizen/police encounter without probable cause can not be used as a test to see if the supposedly innocent citizen incriminates himself by running away. Realistically, we all know that running from the police indicates guilt or fear warranting further investigation. However, the constitutional requirement of probable cause can not be satisfied by the bootstrapping effect of tackling the apparently innocent person who chooses to sprint instead of politely declining to be searched.

The case is remanded with directions to discharge appellant.

REVERSED AND REMANDED.

DOWNEY and WALDEN, JJ., concur.

IN THE DISTRICT COURT OF APPEAL OF THE
STATE OF FLORIDA

FOURTH DISTRICT

JEFFREY NEASE a/k/a
MICHAEL COLWELL a/k/a
LOUIS POYNTER,

Appellant, CASE NO. 82-2164

v.

STATE OF FLORIDA,

Appellee.
_____/

January 18, 1984

BY ORDER OF THE COURT:

ORDERED that Appellee's December 22, 1983 Motion for Rehearing is denied.

I hereby certify the foregoing is a true copy of the original court order.

CLYDE L. HEATH,
CLERK.

cc: Marlyn J. Altman, Assistant
Attorney General

Stephen J. Finta, Attorney

cms

SUPREME COURT OF FLORIDA

FRIDAY, JUNE 29, 1984

STATE OF FLORIDA,	)	
	)	
Petitioner,	)	CASE NO. 64,795
	)	
v.	)	
	)	
JEFFREY NEASE, etc.,	)	District Court of Appeal, 4th District - No. 82-2164
	)	
Respondent.	)	
	)	

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution (1980), and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No motion for rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d).

ALDERMAN, C.J., OVERTON, McDONALD and SHAW, JJ., concur
ADKINS, BOYD and EHRLICH, JJ., dissent

A True Copy

TEST:

Sid J. White
Clerk Supreme Court

by:

Deputy Clerk

TC

cc: Hon. Clyde L. Heath, Clerk
Hon. Patricia Cocalis, Judge
Hon. Robert E. Lockwood, Clerk

Marlyn J. Altman, Esquire

Steven J. Finta, Esquire

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CLERK

CASE NO.: 84-244

IN THE SUPREME COURT OF THE

UNITED STATES

OCTOBER TERM, 1984

STATE OF FLORIDA,

Petitioner,

vs.

JEFFREY NEASE a/k/a MICHAEL COLWELL
a/k/a LOUIS POYNTER,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA, FOURTH DISTRICT.

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BEST AVAILABLE COPY

QUESTION PRESENTED

WHETHER THE FOURTH DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA CORRECTLY CONSTRUED THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION, AND FLORIDA V. ROYER, ___U.S. ___, ___, S. Ct. ___, 75 L.Ed. 2d 229 (1983) BY HOLDING THAT THE CIRCUMSTANCES IN THIS CASE WERE NOT SUFFICIENT TO JUSTIFY THE INITIAL STOP?

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OPINIONS BELOW

The Respondent hereby adopts and accepts the OPINIONS BELOW from the State's Petition for Writ of Certiorari.

JURISDICTION

The Petitioner seeks jurisdiction pursuant to 28 U.S.C. §1257(3).

FEDERAL CONSTITUTIONAL PROVISION INVOKED AND STATEMENT OF THE CASE

The Defendant would accept the Petitioner's version of the above, as set forth in their Brief.

THE REASON FOR NOT GRANTING THE WRIT ARGUMENT

The Court has reviewed a factual scenario remarkably similar to this case in the case of Reid v. Georgia, 448 U.S. 438 (1980). While it may be that the lower court could have cited more appropriate cases in support of the

ruling it made, it is clear that precedent in Florida supports the appellate decision. See, Martinez v. State, 414 So.2d 301 (4th D.C.A.) 1982.

The Petitioner's position fails to look to the guidance of when an arrest may implicate the Fourth Amendment of the United States Constitution as set forth in United States v. Mendenhall, 448 U.S. 908 (1980):

> A seizure has occurred if in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.

In United States v. Berry, 670 F.2d 583 (5th Cir. 1982), the Court stated as follows:

> We do not wish to shackle police absolutely to a rigid and awkward rule requiring them to inform individuals that they are free to not accompany police police to an office, but we do believe that

> only exceptionally clear evidence of consent should overcome a presumption that a person requested to accompany an agent to an office no longer would feel free to leave. Such a request combines a substantial intrusion on an individual's freedom, a marked increase in the coercive nature of the environment in which the individual will be responding to police, and substantial psychological coercion from the intimation that there is strong suspicion that an individual is involved in criminal conduct ... Even verbal agreement to accompany an officer should be scrutinized exceptionally closely to ensure a complete absence of coercive influence.
>
> 670 F.2d 598

The reasoning of the Berry Court, supra, was embellished in United States v. Elsoffer, 671 F.2d 1294 (11th Cir. 1982):

> We note that a holding [of a seizure prior to the request to go to the lounge] would not differ ... even if the record was clear in showing that the agents had returned Elshoffer's documents before asking him whether he would consent to a search or go to a lounge. We

> do not believe that after a return of the documents retained during interrogation, followed by requests to consent to a search and go to an office, an individual would feel that his detention had ended.
>
> 671 F.2d at 1298, N. 7

Also, in accord, see United States v. Waksal, 709 F.2d 653 (11th Cir. 1983) and United States v. Ilayi, 730 F.2d 1120 (8th Cir. 1984).

Clearly, the Defendant was arrested for purposes of the Fourth Amendment when the officers reidentified themselves and asked for consent to search the Defendant, and for him to accompany them to a remote room; not at a later time when he was running away.

The case of United States v. Harley, 682 F.2d 398 (2nd Cir. 1982) holds nothing to the contrary:

> [D]eliberate furtive actions and flight at the approach of strangers or law officers are strong indicia of mens rea,

> and when coupled with specific knowledge on the part of the officer relating the suspect to the evidence of crime, they are proper factors to be considered in the decision to make an arrest.
>
> 682 F.2d at 401

The decision of the State Appellate Court was entirely proper, and will not stand in contravention of any decisions of this Court. To hold otherwise would require this Court to reverse the posture taken in Reid v. Georgia, supra and serve to add uncertainty to an area of the law where the Court has struggled to delineate guidelines concerning when the Fourth Amendment is implicated.

CONCLUSION

The petition for Writ of Certiorari should be denied.

I HEREBY CERTIFY that a copy of the foregoing was furnished to MARLYN ALTMAN, ESQUIRE, 111 Georgia Avenue,

Suite 204, West Palm Beach, Florida 33401, this 20th day of September, 1984.

Respectfully submitted,

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